87-366

Supreme Court, U.S.
FILED
JUN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM ,1987

MARK AKINS, PETITIONER

v.

DISTRICT OF COLUMBIA, PRETRIAL SERVICES AGENCY, ET AL and IBM CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RICHARD L. ROBLE
1297 REILLY LANE
CLARKSTON, GA 30021
(404) 296-8031

QUESTIONS PRESENTED

QUESTION 1

A.

Whether the District of Columbia is liable for injuries, received by Mark Akins during the perpetration of Clifford Williams' tenth robbery, for its negligence involving the failure of the District's Pretrial Services Agency's to perform a mandatory ministerial function to advise the judicial officer presiding at Williams' bail hearing of nine previous robberies committed by Clifford Williams, contrary to the Bail Reform Act, Pretrial Services Agency enabling statute, §23-1301 et seq.

B.

Whether the District of Columbia Statute §23-1301 et seq, as exemplified by its legislative history created a "special duty" to the Petitioner and those in his

class as distinguished from a "general" duty, thereby rendering the issue of "governmental liability" a viable issue mandating review of the propriety of the Court of Appeals affirming the respondents rule 12(b)(6) motion and dismissing the case.

QUESTION 2

Whether the intervening criminal act of Clifford Williams was foreseeable as to render the Respondent IBM negligent for the failure of the Computer system to malfunction on two separate occasions when Clifford Williams was before the Court.

QUESTION 3

A.

Whether it was error for the trial Court to grant the defendants 12(b)(6) motions when additional facts which would have been elicited by civil discovery proceedings were necessary before an

ultimate judgment could be formed.

B.

Whether the District of Columbia Statute §23-1301 et seq, as exemplified by its legislative history created a "special" duty to the Petitioner and those in his class as distinguished from a "general" duty thereby rendering the issue of "governmental liability" a viable issue mandating review of the propriety of the Court of Appeals affirming the respondents rule 12(b)(6) motion and dismissing the case.

TABLE OF CONTENTS

Questions presented i

Opinion below 1

Jurisdiction 1

Constitutional and other provisions involved 3

Statement of the Case 5

Argument Issue 1 10

Argument Issue 2 32

Argument Issue 3 43

Conclusion 54

Appendicies

Trial Court Opinion below 1

District of Columbia, Court of Appeals opinion 4

Notice to District Court of Appeal

TABLE OF AUTHORITIES

CASES

Abaldos v Bernalillo County District Attorney , 734 P2D 794 (N.M. APP.1987), 30

Abdallah v Caribbean Security Agency
557 F2d 61 (1971) 41

Acevedo v Pima County Adult Probation
142 Ariz. 319, 690 P2d 38, 3, 27

Becker v Colonial Parking Inc
409 F2d 1130 (D.C. 1969) 38

Bellavame v State
390 So, 2d 422 (Fla. Ct App 1980) 30

Boyd v Bulala
647 F Supp 781
(W.D. Va 1986), 33,53

Brown v. Bluefield Municipal Building
280 S.E. 2d 101, (West Va 1981) 49

Candler v District of Columbia
404 A2d 964 (1979), 11,12,23

Carolyn Warren v D.C.
444 A2d 1 (1981), 28

CECO v Coleman
441 A 2d 940 , 942 (D.C. 1982), 40

Conley v Gibson
355 U.S. 41,(1957) 45,51,53

Dalehite v U.S.
346 U.S. 15, 31

District of Columbia v Freeman
477 A.2d 713 (D.C.1984) 40

District of Columbia v Jane Doe
____ A2d ____, 12,13,33

Division of Corrections v Neokak
721 P2d 1121 (Alaska 1986) 30

Doe v Argulles
716 P 2d 279 (Utah 1985), 30

Eiseman v State
489 N.Y.S. 2d 957
(New York App.1985) 30

Fair v U.S.
234 F2d 288 (5th Cir. 1956), 30

Fink v Kasler Corporation
649 P2d 1173 (Hawaii 1982) 42

Gordon v National Youth Work Alliance
675 F.2d 356, (D.C. Cir. 1982) 51

Graham v M&J Corp.
424 A.2d 103, 197 (D.C. 1980), 40

Hardman v County of Lehigh
613 F.Supp 649 (E.D. Pa 1985) 30

Hollenbeck v Selectone Corp.
131 Ill. App. 3d 969, 38

Johnson v State
69 Cal 2d 782, 73 Cal Rptr 240, 28

Lacy v District of Columbia
424 A2d 323, 33

Martinez v California
444 U.S. 277,
67 L.Ed. 2d 481, 30,31

McBryde v Amoco Oil Co
404 A.2d 200 (D.C. 1979), 51

Morgan v County of Yuba
41 Cal Rptr 508 (Cal 1964) 30

Morgan v. District of Columbia
468 A2d 1306 (D.C.1983) 11

Owens v Tiber Island
Condominium Association
373 A2d 890 (D.C. 1979) 51

Payton v U.S.
679 F2d 475
(5th Cir. 1982), 19,20,21

Petersen v. State of Washington
671 P2d 230 (1983), 14

Province v Brown
532 P 2d 948 (Colo, 1975), 30

Randall v AFA Protective Systems
516 F. Supp 1122, 41

Reynolds v State
471 N.E. 2d 776 (Ohio , 1984), 30

Rustin & Tate v District of Columbia
491 A2d 496 (1985) 23,24

Ryan v State of Arizona and Morgan
656 P2d 597,
134 Ariz 308 (1982) 2,29,30

Sames et al v Gable et al
732 F2d 49; (3rd Cir 1984) 50

St. Paul Fire & Marine v Davis
Construction
350 A2d 751 (D.C. 1976) 40

Stanton v Chase
497 A2d 1066 (1985), 22,23,26

Swartz v. Eberly
212 F. Supp 32.
(D.C. Pa 1962), 45

Taitt v U.S. et al
770 F2d 890
(10th/ Cir 1985), 21,31

Turnbull v Andrew Crowe
572 F. Supp 1254 (D.C. Mich 1983), 48

U.S. v Salerno et al
107 S. Ct. 2095, 15

Underwood v. United States
356 234 F2d 288 (5th Cir 1956) 20

Wade v District of Columbia
310 A. 2d 857, 23

Wagshal v District of Columbia
216 A 2d 172,(D.C. 1966) 23

Wrenn v State of Kansas
561 F. Supp 1216 (1983), 52

OTHER AUTHORITIES

Wright & Miller §§ 2725
note 30 and §2730., 48

Wright & Miller, §64, 51
Wright & Miller§46 47
Wright & Miller § 1356 44
Wright & Miller § 2725, 47

District of Columbia Statutes:

§23-1301, 14
§23-1321, 15
§23-1322, 15

§23-1322(a)(1) and (2), 19

Misc:

30 A.T.L.A. Law Rptr 62
(March 1987), 53

§448 of the Restatement of Torts 2d , 41

Restatement of Torts (second) § 324A, 41

67 C.J.S.
"Officers & Public Officials" §208, 27

72 C.J.S. Supp.
"Products Liability" § 39, 42

A 1970 supplement to the Hearings before
Subcommittee 18

Congressional Record-Senate
July 1969, pgs. 19,26, 17

91st Congress
Report of the Advisory Panel , 16

RULES OF CIVIL PROCEDURES

Rule 12 (b)(6), 32,34,35,
44,45,46,
51,53

Rule 56, 44,45,46

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK AKINS, PETITIONER

v.

DISTRICT OF COLUMBIA, PRETRIAL SERVICES AGENCY, ET AL and IBM CORPORATION.

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is found in the Appendix hereto.

JURISDICTION

The judgment and opinion of the District of Columbia Court of Appeals was entered on March 31,1987. This petition for

a Writ of Certiorari has been filed within 90 days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 1257 due to the unique status of the District of Columbia Courts.

This case is significant to the jurisprudence of the Country because of the socio-legal issues created by the needs and rights of victims of crimes. Additionally, there are inconsistencies in state court rulings in this area of the law which have made the task of the lower courts more difficult. Arizona for example rescinded their immunity in Ryan v State of Arizona and Morgan, 656 P2d 597 (1982). Other states have likewise eroded the doctrine of immunity creating considerable judicial confusion.

Interpretation is also needed of the District of Columbia Statutes §23-1301, the Bail Agency in view of the recent decision of U.S. v Salerno affirming the

Constitutionality of pretrial detention.

CONSTITUTIONAL AND OTHER PROVISIONS INVOKED

This case is based , inter alia, on the 14th Amendment and the 7th Amendment to the Constitution of the United States which provides as follows:

14 th Amendment, U.S. Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws."

7 th Amendment, U.S. Constitution "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.."

District of Columbia Bail Agency and

Pretrial Detention Act § 23-1301, et seq ,as provided in the appendices hereto. More particularly §23-1303 (a) which provides in part, ". . . The agency shall seek independent verification of information obtained during the interview, shall secure any such person's prior criminal record which shall be made available by the Metropolitan Police Department, and shall prepare a written report of the information for submission to the appropriate judicial officer. The report to the judicial officer shall, where appropriate, include a recommendation as to whether such person should be released or detained under any of the conditions specified in subchapter II of this chapter."

The Petitioner's 14 th Amendment rights were violated by the District of Columbia in that the Petitioner's rights to liberty was violated by the release of one Clifford Williams in violation of a

mandatory duty on the part of the District of Columbia to keep bail-setting judges appraised of defendants criminal records.

The Petitioners 7 th/ Amendment Rights have been violated in that the District of Columbia's Appellate Court ruled that in no way could the Petitioner's injuries be foreseeable to the Defendant IBM, which ruling usurped the province of the jury in violation of the rule that, on a 12 (b)(6) motion, all motions in question are to be interpreted in the light most favorable to the non-moving party.

QUESTIONS PRESENTED

Questions presented are located on the first pages after the cover sheet.

STATEMENT OF THE CASE

On July 29, 1970, the Congress enacted the Bail Agency (Pretrial Services Agency) and Pretrial Detention Act for the District

of Columbia, §23-1301. This created an Agency (the Pretrial Services Agency) which imposed an affirmative ministerial duty to provide verified information concerning any individual with respect to whom a bail or citation determination is to be made. The information was made available to the PSA by the computer system of the Respondent IBM.

On or about May 11, 1982, the Petitioner, Mark Akins, was the victim of an armed robbery in Washington D.C. and was critically wounded in the robbery by the perpetrator, Clifford Henry Williams, an 18 year old black youth with a recent criminal history of nine other armed robberies .

On or about February 26, 1982, the same Clifford Henry Williams committed an armed robbery against one Lee Starkey. Williams was arrested for the Starkey robbery and on April 17, 1982, was released on his own recognizance to appear for a line up on April 27, 1982. Williams was released

because the IBM computer system of the Pretrial Service Agency (referred to as PSA) was not operating and the PSA failed to disclose to the arraigning Judge, Clifford Williams history of violence.

Clifford Henry Williams failed to appear for the line up on April 27, 1982, but, did commit another armed robbery against one Thomas Kelley during the evening of April 27, 1982. On May 4, 1982, Clifford Williams was again released but this time on a three thousand dollar surety bond for the Kelley armed robbery, his second armed robbery in less than three months. Once again, the PSA computer system was not operating and the PSA failed to inform the arraigning Judge of the pending armed robbery charge involving Mr. Starkey or the 7 juvenile robberies and that Clifford Williams failed to appear for a line-up.

On May 11, 1982, Clifford Williams, who

had been released pending trial on two other armed robberies, robbed the Petitioner, Mark Akins and stabbed him in the heart rendering Mr. Akins permanently disabled.

The armed robbery against the Petitioner was the third armed robbery committed by Clifford Williams during a three month period. Clifford Williams was 17 years old at the time of commission of these offenses and was treated as an adult. As a juvenile he had a record of seven (7) robberies or attempted robberies.

Clifford Williams was released on bond following the arrest for the first and second armed robbery because the Respondent Pretrial Services Agency did not obtain the criminal record of Clifford Henry Williams because the ". . . . computer data system was not working and no dispositions were available." PSA was also unable to contact the defendant's (Clifford William's) references. Based on the information known

to the defendant Pretrial Services Agency, the PSA recommended, "Based upon the information known to the Pretrial Services Agency tne Agency recommends no conditions in the Appearance category (of Clifford Williams)."

The Respondent PSA had also failed to report to the arraigning judge hearing the second armed robbery arraignment that Clifford Williams had a juvenile record of seven armed robberies, an additional pending adult armed robbery charge and that he had failed to appear for a court ordered line up on April 27, 1982, because the computers were down.

The Petitioner filed civil suit on May 9, 1985, in the Superior Court for the District of Columbia against the District of Columbia, Pretrial Services Agency and unknown employees of PSA and against IBM. IBM furnished and maintained the computer

system used by the District's Pretrial Service Agency. The defendants filed motions under 12(b)6 to dismiss the complaint for failure to state a claim upon which relief could be granted.

On September 25, 1985, the trial judge, the Honorable Frederick H. Weisberg of the D.C. Circuit heard arguments on the defendants motion. The trial judge granted the defendants 12(b)6 motion to dismiss.

The case was appealed and on March 31, 1987, the opinion of the trial court was affirmed. This petition for Certiorari is now filed.

ISSUE 1

Whether the District of Columbia is liable for injuries received by Mark Akins during the perpetration of Clifford Williams tenth robbery for the negligence in the failure of the District's Pretrial Services Agency's to perform a ministerial function

and advise the judicial officer of nine previous armed robberies committed by Clifford Williams contrary to the Bail Reform Act, Pretrial Services Agency enabling statute, §23-1301 et seq.

ARGUMENT

The District of Columbia Court of Appeals misplaced the basis of its decision by relying on Morgan v. District of Columbia, 468 A2d 1306 (D.C. Ct. App, 1983), standing for the proposition that the District of Columbia and its agencies have sovereign immunity. As the Morgan case points out, "In "narrow situations, however, the no-liability rule does not apply." In an earlier decision, Candler v District of Columbia, 404 A2d 964 (1979), the Court reiterated that in discretionary matters there was immunity and further indicated that if policy considerations were involved and no statutory or regulatory requirements

limited the exercise of that policy discretion, sovereign immunity would bar suit. As logic dictates then, the inverse of that proposition would become a basis for liability.

In order for there to be liability, there must be a duty of care owed to the individual by the District of Columbia. The Candler case mentioned in closing that there are exceptions to immunity that follow from the doctrine that the duty of care encompasses foreseeable consequences and thus, when a special relationship develops between an agent of the government and a private individual, a duty of care may be found.

With these principals in mind, let us progress to the most recent case of District of Columbia v Jane Doe, ____ A2d ____, docket number 85-1219, decided April 13, 1987. The Court of Appeals affirmed the District Court finding liability against the

District for civil damages resulting from an unknown intruder breaking into Plummer Elementary School and raping a female fourth grade student. The District unsuccessfully argued that the criminal act was unforseeable and as a matter of law the District could not have reasonably anticipated the intervening criminal conduct.

In affirming the District Court finding of liability, the Jane Doe Court held, "Where the injury to the Plaintiff was caused by the intervening act of a third party, the District of Columbia is liable for negligence only if the danger of that act should have been reasonably anticipated and protected against. In the case of an individual like Clifford Williams, who had already committed nine (9) such armed robberies, it is reasonable and foreseeable that if he were placed back on the street he

would commit another armed robbery.

In some instances, the foreseeability of injury from dangerous persons can almost be taken for granted. See Petersen v. State of Washington, 671 P2d 230 (1983), which held that the issue of proximate cause is for the trier of fact when the facts and the inferences to be drawn from them are in dispute.

The enabling statute creating the Pretrial Services Agency and outlining its responsibilities is §23-1301 et seq. It is the contention of the Plaintiff that this legislative enactment creates the duty to furnish the criminal history of a criminal defendant to the appropriate judicial officer (See §23-1303) and when this duty was breached, the intervening criminal act of Clifford Williams was foreseeable and should have been anticipated.

The purpose of the Act is to create an agency to assist the Court by gathering

relevant information to aide the judicial officer in setting bail in an amount to reasonably assure the appearance of the person as required or whether to detain the person for the safety of any other person or the community. §23-1321. (emphasis added) It is not Unconstitutional to deny bail. See U.S. v Salerno et al 107 S. Ct. 2095, May 26, 1987, which held in part that the government's regulatory interest in community safety can in appropriate circumstances outweigh an individual's liberty interest and therefore where Congress has mandated detention on the basis of some other interest - here, the public safety- the Eighth Amendment does not require release on bail. The guidelines of §23-1322 mandated that a person with a criminal record of 9 robberies plus a failure to appear at a court ordered line up be placed in detention prior to trial. Since

the judicial officer was not furnished the relevant material and instead was deliberately furnished a false and misleading report by PSA, there is a breach of PSA's statutory duty.

In 1969, the 91st Congress convened a panel for advice on how to combat crime in the Washington D.C. area and urged the "enactment of bail legislation to permit pretrial detention of certain defendants who pose a danger to the community." The report pointed out the high degree of recidivism among accused felons on bail awaiting trial. See 91st Congress, Report of the Advisory Panel Against Armed Violence, 1969.

The Bail Reform Act was aimed at amending the previous consideration for bail, the likelihood of flight and recognized the real need is to protect the community from other crimes committed by the people being released. The Congressional record is replete with statistics that this

problem of street violence and recidivism is higher in the District of Columbia than other areas.

The Bail Agency, Pretrial Services Agency Statutes were enacted July 29, 1970, following the Congressional study to remove the subterfuge of detaining persons who might present a danger to the community by the imposition of higher bonds. Under the PSA act, there was now authority to consider the danger to the community in setting conditions of pretrial release. See Congressional Record-Senate, July 1969, pgs. 19,260 and 19,263. The legislative intent shows, "With a crime rate that is increasing at an appalling rate,and with too many crimes being committed by criminals who are hard-core recidivists, crimes committed by persons while on pretrial release have become a serious problems Widely varying percentages of defendants charged with

serious crimes while on bail or release have been shown by different studies. Despite the differences, these studies reveal at the least that defendants charged with serious crimes while on bail or release or who have records for previous serious offenses, to be cause for public and official concern." A 1970 supplement to the Hearings before the subcommittee of the Ninety First Congress on Bail Reform stated, "But we also believe that provision must be made for those criminal suspects whose past history and course of conduct might reasonably lead one to believe that there is a very high potential for them to commit a crime if they are released."

"The Problem is particularly acute in the District of Columbia. No other federal judicial District faces the high volume of street crime we face here. . . " Statement of Hon. John Mitchell, Attorney General, January 29, 1970, Bail Reform and Pretrial

Detention, Supplement to Subcommittee, 91st Congress, pg 11-12.

The act of the PSA is a ministerial one with no discretion. They are to file a report with the judicial officer so the judicial officer can exercise discretion. Their discretion is however limited to setting bail to prevent unlawful flight. In the Williams' case there would have been no bail set because under §23-1322(a)(1) and (2) the Williams arraigning judicial officer would have been required to detain Clifford Williams without bail. Therefore, but for the failure of the PSA to furnish the judicial officer with Clifford Williams "rap sheet", Williams would have been detained after the Starkey (certainly after the Kelley robbery) and Mark Akins would not have been robbed and stabbed in the heart.

A similar case, Payton v U.S., 679 F2d 475 (5th Cir. 1982), was a negligence action

for the "wrongful"release of a federal parolee, Thomas Whisenhant, who subsequently murdered three women including the plaintiff's wife, Sheryl Payton. The case held that the government was liable not for releasing Whisenhant because that was a discretionary act but, was liable because the Bureau of Prisons did not furnish the Parole Board with Whisenhant's records. Those records would have shown Whisenhant was psychotic and needed inpatient psychiatric treatment.

A "discretionary function or duty" can not form the basis for a suit but, when the discretionary function is either followed or preceded by a nondiscretionary acts of execution, whether termed operational, ministerial or clerical and these are actionable. The Payton decision supra, also cited Underwood v. United States, 356 234 F2d 288 (5th Cir. 1956) which found liability when Underwood, a mentally

disturbed airman was released from hospitalization, returned to active duty and killed his wife. The 5th/ Circuit found actionable negligence not in the decision to release the airman from the hospital, but rather in the failure of the initial physician to transfer vital information to his "replacement".

In Summary, the Payton case held that 18 USC § 4208(c) placed a duty analogous to that of the District PSA enabling statute, on the Bureau of Prisons to provide the parole board with Wishenant's records. No discretion is involved. The district court therefore had jurisdiction to enter this count of the complaint.

Taitt v U.S. et al, 770 F2d 890 ((10th/ Cir 1985) is another "wrongful" prisoner release case based in part on the fact that the Government failed to provide the Board of Parole with the required information

before the prisoner Pruett's release on parole of his violent propensities. The Court held that the duty of the Bureau of the Prisons to provide records was not discretionary and remanded the case back to the trial court to complete discovery.

The District of Columbia circuit has decided other issues dealing with ministerial duties and immunity. In addition to Stanton v Chase, 497 A2d 1066 (1985) *** (dealing with judicial immunity),

---

*** In Stanton, Stanton sued Chase who was a deputy in the Criminal Justice Office whose function it was to maintain records and make recommendations to the judges for court appointed attorneys in indigent cases. The case does not reflect what Chase told the judge regarding Stanton's qualifications as an attorney. Since Stanton was recently suspended from practice we can only speculate the remarks dealt with that issue. The suit was for slander and the Appellate Court found that the statements were well within the scope of judicial immunity which is accorded persons performing functions at the direction of a judge assisting the judge in appointing attorneys for indigents. The Petitioner contends Stanton is distinguished because PSA unlike Chase was performing a statutory duty and judicial immunity would not apply.

Rustin & Tate v District of Columbia and Washington Patrol Services, 491 A.2d 496 (April 1985). The Tate decision clears up any ambiguity created by the phrasing in Stanton and is consistent with the general rules of law. "The doctrine of sovereign immunity is well established in the District of Columbia. Chandler v District of Columbia, 404 A.2d 964, 966 (D.C. 1979) Under this doctrine, the District government is immune from suit in tort where the act complained of was committed in the exercise of a discretionary function. However, if the act was committed in the exercise of a ministerial function, the government is not immune. Wade v District of Columbia, 310 A. 2d 857, 860 (D.C. en banc); Wagshal v District of Columbia, 216 A 2d 172, 173 (D.C. 1966)". The Stanton decision does not purport to overrule any of these authorities with regard to ministerial functions.

The Tate decision also defined "ministerial acts" as "those which require the execution of a policy as distinct from its formation. (citations omitted) In contrast, discretionary functions are described as those involving policy considerations where no statutory or regulatory requirements limit the exercise of policy discretion." (emphasis added) PSA has no discretion under the Act.

The negligence is clear. On two separate occasions, the Respondent PSA failed to obtain the criminal record (including juvenile record) of Clifford Williams and as a direct result of that failure, CLifford Williams was released and put back on the street twice and two people were robbed on two separate occasions. The Petitioner was stabbed in the heart and nearly lost his life and incurred a long hospitalization and had to leave his job permanently.

Under the enabling statute forming the PSA and the legislative intent, the purpose of the Act was to protect the District's citizenry from dangerous criminals. Therefore, it is quite obvious that the failure of the computers to function as in the case of Clifford Williams, would put a dangerous individual back on the street and it is quite reasonable and anticipated that another citizen would be injured. Because PSA should have realized the intervening act of Clifford Williams or others in his class, there is liability.

This Court is directed to §319 of the Restatement of Torts (Second) which states: "One who takes charge of a third person whom he knows or should know to be likely to cause harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The release of a

probationer or inmate may involve a discretionary function on the part of a parole board but, the absolute and total failure to provide information as required by statute on the criminal background of a defendant facing arraignment on a serious charge is not a discretionary function and in that case PSA and the District of Columbia does not enjoy immunity. (Stanton v Chase was a discretionary function)

A ministerial act is defined in Blacks Law Dictionary as one in which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his own authority.

The most generally recognized exception to the rule of immunity is that an officer is liable for damages resulting from his performance of a purely ministerial duty, for, if by statute or other rule of law, the official's duty is clearly ministerial

rather than discretionary, a cause of action lies for an individual injured by negligent performance of that duty. Consequently, the judicial or discretionary privilege does not protect ministerial officers who act wrongfully, although in good faith, and a like rule applies to an officer exercising a ministerial function even though he may be charged with judicial or discretionary duties. 44 A.L.R. 4th 638 citing 63 Am Jur 22d, Public Officers and Employees § 363. Also see 67 C.J.S. "Officers & Public Officials" §208.

In Acevedo v Pima County Adult Probation, 142 Ariz. 319, 690 P2d 38, 44 A.L.R. 4th 631 (1984) the Court held that quasi-judicial immunity could not be invoked in the instant case because the probation officers had not acted pursuant to a court's directive and, in fact, had ignored the specific direction of the court. Also see

Johnson v State, 69 Cal 2d 782, 73 Cal Rptr 240, 447 P2d 352. Both cases are similar to the PSA ignoring the directive of the statute to furnish information on Clifford Williams background and both cases imposed liability on the municipality.

Therefore a special duty was created beyond the existing public duty This is not a situation of failing to provide adequate police protection like described in Carolyn Warren v D.C. , 444 A2d 1 (1981) and which falls under the general principle that the government and its agents are under no general duty to provide public services such as police protection to any particular individual citizen. This principle is distinguished here because for one, the "police protection" cases are based on "discretion". What constitutes proper police procedure is a "judgment call". What we have here is a failure to perform a described ministerial act in not furnishing

the prior criminal record of Clifford Williams. This litigation is not predicated upon the failure of the police to protect Mr. Akins from violence on the street.

Secondly, the Bail retention act and the legislative intent created a special duty and the undertaking of the PSA to even furnish a document to the Court that their computers were "down" is a pronouncement they had a duty and they were nct going to fulfill that duty. This is a case of affirmative negligence and anyone, including a government agency would be liable.

While string-citing cases is not good form, it does show that these "negligent release" issues have been treated by Courts around the land and illustrate the overwhelming need for the highest Court to rule on these issues.

Arizona has completely abolished their sovereign immunity statute in Ryan v State

of Arizona, 134 Ariz. 308, 656 P2d 597, 38 A.L.R. 4th 1188. The negligent release issue was also favorably considered in Abaldos v Bernalillo County District Attorney, 734 P2d 794 (N.M. App 1987); Bellavame v State, 390 So, 2d 4[illegible]2 (Fla. Ct App 1980); Division of Corrections v Neokak 721 P2d 1121 (Alaska, 1986) Doe v Argulles, 716 P 2d 279 (Utah 1985); Eiseman v State, 489 N.Y.S. 2d 957 (New York App. Div. 1985); Fair v U.S., 234 F2d 288 (5th Cir. 1956); Hardman v County of Lehigh, 613 F.Supp 649 (E.D. Pa ,1985); Province v Brown, 532 P 2d 948 (Colo, 1975); Reynolds v State, 471 N.E. 2d 776 (Ohio , 1984);Morgan v County of Yuba, 41 Cal Rptr 508 (Cal Ct App 1964).

The 14th/ Amendment jurisdictional argument does have a solid basis in the law. Even the controversial Martinez v California, 444 U.S. 277, 67 L.Ed. 2d 481, 100 S.Ct. 553 (1979) which dealt with a California immunity statute which

distinguished Akins, it reserved the question of what immunity, if any, a state parole officer has in a §1983 action where a Constitutional violation is made out by the allegation. In MArtinez there was a four month delay between the "negligent" release and the subsequent injury which affects the issue of causation. In this vein and in support of the argument that these issues require more fact finding than was present in Akins, Taitt v U.S. et al, 770 F2d 890 (1985) quoting Dalehite v U.S., 346 U.S. 15,35-36 stated, "A review of these cases, and others, reveals that the determination of whether or not a given act by the United States is discretionary, and so excluded from coverage under the Federal Tort Claims Act is very much a factual issue, depending upon evidentiary circumstances present in each individual case."

ISSUE 2

Whether the intervening criminal act of Clifford Williams was foreseeable as to render the Respondent IBM negligent for the failure of the Computer system to malfunction on two separate occasions when Clifford Williams was before the Court.

ARGUMENT

If computers are going to control our life they and their manufacturers and servicing people are going to have to accept liability for their misfeasance and nonfeasance. The by words "the computer is down" is panacea for relief from all sorts of clerical errors, from not recording bank deposits to letting a dangerous individual like Clifford Williams out on the streets.

The 7th/ Amendment to the Constitution of the United States guarantees a civil jury trial; misuse of a rule 12(b)(6) by definition, deprives the Petitioner of a

jury trial if he is precluded from placing his case, on disputed factual issues before a jury; hence the Petitioner's 7th/ Amendment Rights were violated. See Boyd v Bulala, 647 F. Supp 781 (W.D.Va., 1986).

The Appellate Court relied on Lacy v District of Columbia, 424 A2d 323 in affirming the dismissal of the claim against the defendant IBM. This authority is misplaced because, at 424 A2d at 323, it was held that " where an injury is caused by the intervening act of a third party, a defendant is liable for negligence only if the danger of that act should have been reasonably anticipated and protected against. Also see District of Columbia v Jane Doe, infra.

The job IBM bid on and obtained from the Pretrial Services Agency was the supplying and maintenance of the computers whose purpose it was to retrieve the

criminal records (rap sheets) of criminal defendants. Under the enabling statute forming the PSA and the legislative intent, the purpose was to protect the District's citizenry from dangerous criminals. Therefore, it is reasonably foreseeable that the failure of the computers to function as in the case of Clifford Williams, would put a dangerous individual back on the street and it is reasonable and could have been anticipated that another citizen would be injured. Because the data bank PSA was relying on dealt with criminal activity, IBM should have realized the intervening criminal act of Williams or others in his class, there is liability. If this were not the case, why utilize the computer system in the first place.

The issue dealing with the Respondent IBM is a prime example of the inadequacy of a rule 12(b)(6) motion for handling complex litigation. To defeat the motion it is

merely necessary that the Petitioner be able to show a cause of action under a legal theory. This is not a summary judgment nor does the Petitioner have to show that he would necessarily prevail upon a trial on the merits.

The Petitioner did properly allege at least a colorable cause of action against IBM but discovery was necessary to develop the relationship between IBM and the Pretrial Services Agency and the District of Columbia. This is reserved for the trial on the merits, not a 12(b)(6) motion. All the Petitioner knows is that on two occasions the PSA went to the computers to obtain information on Clifford Williams, the computers were not able to respond. In the vernacular, "the computers were down". Discovery is necessary to determine the reason why the computers were down and whether this constitutes actionable

negligence.

Discovery also would show the contract and service agreement between IBM and the other defendants. An examination of the service records would show the "down" time on the PSA computers in general and show the difficulties between the respective terminals and the main frame. Discovery would also show whether there was any training program that IBM was to furnish employees at PSA on how to operate the computer system. Discovery would also show whether the computer system was adequate for the demands placed upon it by the Respondent PSA.

Additionally, and of critical importance, discovery would show how many other times defendant were erroneously released on low bail or personal recognizance because "the computers were down", and how many times those who were so released committed other crimes.

It is an invalid argument for IBM to state that they did not know that their computers were going to be used to retrieve the criminal records and history of violence on various individuals brought before the court system to determine their suitability for Bail. The fallacy with that argument is that the Respondent IBM could not furnish, load the system and train operators for the system without knowing the type of information that was going to be stored in the mainframe and the need to retrieve it. IBM was the "pioneer" business entity in the American Computer industry and they should be held to a high standard.

The Petitioner was in the class of people to be protected by the Pretrial Services Agency enabling act and the IBM corporation was aware that the type of information their system had to retrieve was that type of information necessary to

implement the PSA act. Therefore, Petitioner's injury was foreseeable just as any individual is a foreseeable victim in a products liability case. See Becker v Colonial Parking Inc, 409 F2d 1130, 1134 (D.C. 1969)

The Illinois Courts recently handled a similar issue in Hollenbeck v Selectone Corp., 131 Ill. App. 3d 969, 476 NE2d 746 (1985) involving a defective emergency paging device for a police officer. The defendant corporation manufactured a paging device that a police office would use to summon emergency assistance. In this instance, the officer activated the pager in reliance on it notifying headquarters that he needed assistance and proceeded to make the arrest. The pager malfunctioned and the officer was injured in the arrest procedure and brought suit. The trial court dismissed on apparently a 12(b)(6) type motion and the Appeals Court reversed. The trial court

argued that the intervening action of the robber in injuring the police officer broke the chain of causation and the police officer was not able to recover. The Appeals Court reversed holding, "We find that the intervening criminal acts were not so improbable and unforseeable as to break the causal connection" and that probable and foreseeable means "objectively reasonable to expect".

If IBM owed a duty to the Petitioner, it is necessary to examine whether the breach of that duty proximately caused the Petitioner's injuries. In the District of Columbia Circuit, proximate cause is established "when it appears from a preponderance of the evidence that the act or omission played a substantial part in bringing about the injuries or damages. Further, it must be shown that the injury or damages were either a direct result or a

reasonably foreseeable consequence of the act. See District of Columbia v Freeman, 477 A.2d 713 (D.C. 1984). As discussed, IBM was aware of the uses the PSA computers and the ramifications of the PSA act and therefore it was quite foreseeable that a dangerous or violent person could be released on the streets to hurt somebody else if the computers did not retrieve the information on a criminal defendant properly.

Likewise, an intervening criminal act (Williams attacking the Petitioner) should have been reasonably anticipated and protected against subjecting the defendant IBM to liability. St. Paul Fire & Marine v Davis Construction, 350 A2d 751, 752 (D.C. 1976); Graham v M&J Corp., 424 A.2d 103, 197 (D.C. 1980); CECO v Coleman, 441 A 2d 940 , 942 (D.C. 1982).

The intentional torts of a third party are not always a superseding cause which

breaks the chain of proximate causation and relieves the defendant of liability under section 448 of the Restatement of Torts. See Randall v AFA Protective Systems, 516 F. Supp 1122 (1981) which held the installer of a burglar alarm liable for the losses from a burglary because the alarm failed to detect the entry of an intruder. A similar decision was reached in Abdallah v Caribbean Security Agency, 557 F2d 61 (1977) which adopted the rationale of the Restatement of Torts §448. These cases held that the intervening criminal act did not break the chain of causation and further that the intervening criminal act was foreseeable.

One purpose of the PSA act was to protect the public from dangerous or violent people and in that sense the PSA and the IBM Company fall into the category described by the Restatement of Torts (second) § 324A which in essence provides that one who

undertakes to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to a third person for harm resulting from his failure to exercise reasonable care in such undertaking. See Fink v Kasler Corporation, 649 P2d 1173 (Hawaii 1982)

Under the doctrine of strict liability in tort for a defective product, and other theories of recovery, a nonuser, nonconsumer, or bystander suffering an injury may have a cause of action against the manufacturer. 72 C.J.S. Supp. "Products Liability" § 39. Likewise, under the rule of strict liability in tort, or on the theory of negligence a manufacturer of a defective product may be subject to liability for injuries caused by such product. ibid. §41.

The Bail retention act and the legislative intent created a special duty and the undertaking of the PSA to even

furnish a document to the Court that their computers were "down" is a pronouncement they had a duty and they were not going to fulfill that duty. This is a case of affirmative negligence and anyone, including a government agency and a computer company would be liable.

ISSUE 3

A.

Whether it was error for the trial Court to grant the defendants 12(b)(6) motions when additional facts were obviously necessary before an ultimate judgment could be formed.

B.

Whether the District of Columbia Statute §23-1301 et seq, as exemplified by its legislative history created a "special" duty to the Petitioner and those in his class as distinguished from a "general" duty thereby rendering the issue of "governmental

liability" a viable issue mandating the (error) (impropriety) of the Court of Appeals affirming the respondents rule 12(b)(6) motion and dismissing the case.

ARGUMENT

The Respondent's legal strategy of the case was a rule 12(b)(6) motion made by the respondents to dismiss the case for failure to state a claim upon which relief could be granted.

The motion of the defendants-Respondents was to dismiss the plaintiff-Petitioner's complaint under rule 12(b)(6) and was not a motion for summary judgment under rule 56. A rule 12(b)(6) motion only tests whether the complaint has been adequately stated in the complaint and does not measure the merits of the case nor whether there is a genuine issue of material fact. 5 Federal Practice & Procedure §1356 , pg 592. A motion to dismiss for failure to state a claim is viewed with disfavor and is

rarely granted. ibid., § 1357 note 64. A rule 12(b)(6) motion may be granted only in the clearest of cases and must be denied when additional facts obviously are required before an ultimate judgment may be formed. Swartz v. Eberly, D.C. Pa 1962, 212 F. Supp 32.

In this sense there is an analogy that may be drawn from rule 56(f) in that it was error to grant the defendants motion to dismiss before discovery was completed.

The appellant's counsel did indicate that discovery was not completed. The Court file reflects that there were no interrogatories, document production requests or interrogatories submitted before the 12(b)(6) motion was filed and heard. For example, during the trial court oral arguments, Petitioner's counsel stated that while Judge Kennedy was the arraigning judge and the Petitioner could not prove what he

would have done regarding the bail of Clifford Williams "without going to Judge Kennedy and asking him. That's what discovery is for." (Trial Court Trans. 12)

The Petitioner's counsel also stated that discovery could produce what the internal policies were of Pretrial Services Agency that would cause the issue to fall within the ramifications of a "constitutional tort". "I'm sure that discovery may come up with policies that is internal policies as to what they're supposed to do in that meeting." (See Trial Court Trans pg 21)

Since there is a relationship between 12(b)(6) motions and rule 56 motions, some authorities dealing with rule 56 may be relevant here. Wright & Miller, Federal Practice and Procedure § 2728 discusses that the Court has no authority to enlarge its power beyond the scope of rule 56(c) and may grant a rule 56 motion only when there is no

genuine issue as to any material fact and accordingly, a summary judgment cannot be granted merely because the court believes the movant will eventually prevail if the action is tried on the merits. The same restrictions apply to a 12(b)(6) motion. The Court can not grant a 12(b)(6) motion because they believe that the party may not prevail at trial.

While difficult legal issues do not preclude summary judgment, it has also been held that difficult or complicated legal issues should not be adjudicated upon an inadequate record and the resolution of a complex question of law frequently requires a more concrete factual development than may be obtained through summary proceedings. Wright & Miller, Federal Practice and Procedure § 2728 note 23.

As Wright & Miller § 2725 points out , " . . When a court is called upon to apply a

legal principle in a novel fashion, the potential impact of the decision and the deleterious nature of the conduct called into questions are relevant considerations on a rule 56 motion. In this context a more complete factual record is required and summary judgment ordinarily should be denied if the court has any doubt as to the sufficiency of the movant's showing."

Summary judgment shall only be granted in clear cases because even if the basic facts are not disputed, summary judgment may be inappropriate when contradictory inferences may be drawn from them. Turnbull v Andrew Crowe, 572 F. Supp 1254 (D.C. Mich 1983). Also see Wright & Miller §§ 2725, note 30 and §2730.

Summary Judgment is not appropriate in complex litigation. Extremely complicated cases are not susceptible to adjudication by way of summary judgment because the facts are complex and require full exploration

through discovery and the issues need resolution through the vehicle of an adversary trial.

As stated in Brown v. Bluefield Municipal Building, 280 S.E. 2d 101 (West Va. 1981), in complex cases, the tendency on a summary judgment motion is to rely on the facts developed through discovery as constituting all the relevant facts in the case. This may lead to an inaccurate assessment. A party may often undertake very little discovery or limit the discovery to certain critical areas with the knowledge that he has the requisite proof available without any further discovery. Frequently, discovery depositions of the parties or their key witnesses do not reflect all the relevant facts. This is because these depositions are taken by adverse counsel and the deponents do not care to volunteer information and , therefore, they give

limited answers to the questions. While discovery procedures are useful to develop the facts of a case, there is no requirement that all the facts must be developed through discovery, and certainly no grounds for the assumptions that they have been developed by discovery.

A similar discovery problem was related in Sames et al v Gable et al, 732 F2d 49; 38 Fed. R. Serv. 2d 1528 (3rd Cir, 1984) and the Court vacated the trial Court's granting the defendants motion for summary judgment. Where , however, a non-moving party urges the court to forestall consideration of a summary judgment motion in order to facilitate discovery, rule 56(f) affords a court a measure of discretion in determining whether a summary judgment motion is ripe for resolution.

Consequently, a dismissal under 12(b)(6) is only proper when "it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Owens v Tiber Island Condominium Association, 373 A. 2d 890, 893 (D.C. 1979) quoting Conley v Gibson, 355 U.S. 41, 45 (1957); McBryde v Amoco Oil Co, 404 A.2d 200 (D.C. 1979). The Petitioner further note that during consideration of a 12(b)(6) motion motion, his complaint must be construed in a light most favorable to him and his allegations taken as true. Conley, 355 U.S. at 45-46; McBryde, 404 A.2d at 202 (D.C. 1979). The Court's inquiry is substantially limited to the content of the complaint. Gordon v National Youth Work Alliance, 675 F.2d 356, 366 n. 39 (D.C. Cir 1982)

Motions to dismiss under 12(b)6 are viewed with disfavor especially when additional facts are necessary before the case may be decided. Wright & Miller, Federal Practice & Procedure § 64. Motions

to dismiss are viewed with disfavor and rarely granted; they may be granted only in the clearest of cases and must be denied when additional facts obviously are required before an ultimate judgment may be formed. Wrenn v State of Kansas, 561 F. Supp 1216 (1983)

With these well settled principles of law in mind, the Petitioner submits that he pled a set of facts which supports his claim that the defendant Pretrial Services Agency was negligent in failing to inform the arraigning judge of Clifford William's history of violent crimes which if furnished would have authorized his detention and that negligent act (or acts) was the cause of the Petitioner's injuries. Furthermore, the data stored on the IBM computer which was also serviced by IBM was an integral part of the discharge of the PSA's statutory duties and because of the failure of the IBM equipment

to function, PSA breached their duty to the Petitioner, subjecting IBM to liability.

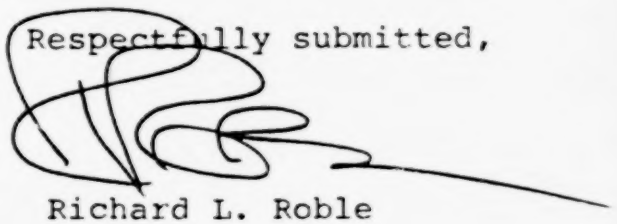
Under all these circumstances it is improper for the trial court to state categorically that there is no set of facts upon which the Petitioner could recover against the defendant IBM. Under a rule 12 (b)(6) motion, everything is to be interpreted in the light most favorable to the non-moving party. Conley v Gibson, 355 U.S. 41. For the Trial Court to grant the movant's motion under these circumstances violates the Petitioners right to a jury trial under the 7 th/ Amendment. See Boyd v Bulala 647 F Supp 781 (W.D. Va 1986) wherein the Court struck down a cap on medical malpractice recovery as invading the province of the jury.(Discussed more fully, 30 A.T.L.A. Law Rptr 62 ,March 1987)

CONCLUSION

It is the position of the Petitioner that he has plead a valid cause of action against both the District of Columbia and IBM and that additional facts are necessary before an ultimate judgment may be rendered.

Therefore the Petitioner prays that this case be remanded back to the trial court to permit the Petitioner to conduct discovery to show the factual basis supporting his claims.

Respectfully submitted,



Richard L. Roble

RICHARD L. ROBLE, ESQ
(Ga. Bar #610900)
(Mich Bar P19534)
1297 REILLY LANE
CLARKSTON, GA 30021
(404) 296-8031

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARK AKINS

Plaintiff

v.

CIVIL ACTION
NO. 3328-85

DISTRICT OF COLUMBIA

Defendants

and

PRETRIAL SERVICES AGENCY

and

UNKNOWN EMPLOYEES OF
PRETRIAL SERVICES AGENCY

and

IBM

ORDER

This matter comes before the Court upon the motion of the Defendants District of Columbia Pretrial Services Agency to dismiss the complaint, or in the alternative, for summary judgment. Upon the consideration of the motion, the memorandum of points and

authorities filed in support thereof, and the entire record herein, it is, by the Court, this 25th/ day of September, 1985,

ORDERED: that the motion of defendants District of Columbia Pretrial Services Agency to dismiss under Rule 12(b)(6) be, and the same is hereby granted.

/s/Frederick Weisberg

Judge

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARK AKINS

Plaintiff

v.

CIVIL ACTION
NO. 3328-85

DISTRICT OF COLUMBIA
et al

Defendants

ORDER

Upon consideration of Defendant's IBM Motion to Dismiss Count IV of the complaint and plaintiff's opposition thereto, it is this 25 day of September, 1985,

ORDERED, that Defendant's motion be, and the same is ,granted

/s/Frederick Weisberg

SUPERIOR COURT JUDGE

DISTRICT OF COLUMBIA COURT OF APPEALS

No.85-1456

MARK AKINS,
Appellant

v. CA 3328-85

DISTRICT OF COLUMBIA, et al
Appellees

Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. Frederick H. Weisberg, Trial Judge)

(Submitted March 24, 1987,
Decided March 31, 1987)

Before TERRY and STEADMAN, Associate Judges, and PAIR Senior Judge

MEMORANDUM OPINION AND JUDGMENT

Appellant contests dismissal of his suit pursuant to Super. Ct. Civ. R. 12(b)(6), for failure to state a claim under which relief can be granted. Upon review of the pleadings and the relevant case law , we affirm.

1.

Appellant initiated this lawsuit after

having been gravely wounded during an armed robbery on MAy 11, 1982. The perpetrator, Clifford Henry Williams, was out on $3000 bond for two previous armed robberies at the time. The arraignment judges who had twice released Williams in the preceding three-month period had done so on the basis of information which failed to include the record of the disposition of Williams prior juvenile offenses. The Pretrial Services Agency (PSA) report did note, however,that Williams had a number of prior juvenile arrests. The disposition information was not included in the PSA report because the computer, installed and maintained by defendant IBM, failed to operate and the defendant PSA employees failed to manually retrieve the information. Nonetheless, the [1]

---

1. On appeal, appellant adds that Williams had been ordered to appear for a line-up identification for one of the prior robberies and had failed to appear. Since this allegation is raised for the first time on appeal, we will not consider it.

PSA report recommended that a hearing be conducted pursuant to D.C. Code § 23-1322 (a)(1981) to determine whether Williams would pose a threat to community safety.

11

Appellant alleges the following facts to demonstrate appellees' liability for negligence: (1) The PSA computer, installed and maintained by IBM, failed to operate on two important occasions; (2) each time, the PSA discovered that their computer was not working, and they could not obtain a full record of Williams arrest and conviction record; (3) ratner than searching for the information by hand, both times the PSA informed the arraigning court that the computer did not work and they could not provide the requested information; therefore (4) the arraignment judge released Williams, once on his own recognizance and then on a

$3000 bond because he was unaware of the full scope of William's previous record.[2] After a hearing, the motions court granted all defendants motions to dismiss under Rule 12(b)(6). The Court based its decision on a number of grounds. We will address only those necessary to resolve this litigation, construing the complaint in the light most favorable to plaintiff, taking the McBryde v Amoco Oil Co., 404 A2d 200, 202 (D.C. 1979)

A.

Appellees District of Columbia, PSA, and PSA employees. This court has recognized that the District of Columbia and its law enforcement officials "generally may not be held liable for failure to protect

---

2. On Appeal, Appellant does not press the validity of the motions court's ruling regarding his constitutional and civil rights claims. Accordingly we do not consider them.

individuals from harm caused by criminal conduct." Morgan v District of Columbia, 468 A2d 1306, 1310 (D.,C. 1983) (en banc).[3] Morgan, like most cases on this subject, deals with a situation where the police have failed to protect an individual from a specific criminal threat. Id., and the cases cited therein. We have employed this doctrine, however, to suits which allege negligence by building inspectors in inspection and enforcement of fire safety standards Platt v District of Columbia, 467 A2d 149 (D.C. 1983); and to suits involving the fire department's alleged breach of duty of care in its ability to respond to a fire, Candler v District of Columbia, 404 A2d 964 (D.C. 1979). In short, our case law has prohibited suits against the District of

---

3. At the 12(b)(6) hearing, appellant conceded that the PSA was not Sui Juris and therefore not a proper party defendant.

Columbia and its employees in situations where the alleged breach of duty involves a duty to the general public to ensure its safety.

The PSA is an agency charged with providing to the Courts information regarding prior criminal records. They do so in order to assist the judiciary in determining how to balance public safety concerns against the accused's right to liberty. This duty, like that of a building inspector, a firefighter, or a police officer, "is a public duty, for neglect of which the officer is amenable to the public, and punishable by indictment only." South v Maryland, 59 U.S. (18 How.) 396, 403 (1855).

We have allowed an exception to this rule only where a specific undertaking to protect a particular individual has occurred, and that individual has justifiably relied upon such an undertaking. Morgan, supra, 468 A2d at 1314-

15. Nowhere in the record has appellant alleged any specific undertaking toward the appellant by PSA, much less a justifiable reliance thereon. We conclude, then, that appellant's suit is barred by this "Public Duty Doctrine".

B.

Appellee IBM. For the Court to conclude that IBM might be held liable to appellant for its assumptively negligent maintenance of the PSA computers, we would have to conclude that IBM's negligence could be characterized as a legal proximate cause of the injury to the Appellant. When a criminal act intervenes between a defendant's negligence and the injury to the plaintiff, we have required that the injury be highly foreseeable before finding the negligent party liable, due to the "extraordinary nature of the criminal conduct." Lacy v District of Columbia, 424 A 2d 317, 322

(D.C. 1980). In Lacy we approved an instruction which required that the defendants have "actual knowledge that the assaults on [appellant] would occur or [have] reason to anticipate the assaults. " Id Standing alone, Williams criminal assault might be possibly be considered a remotely foreseeable result of computer failure at the PSA, but when combined with the intervening inaction of the PSA, and the discretionary decision of the arraigning judge, there is no way to interpret appellant's allegations as showing that appellee IBM had actual knowledge of,or good reason to, anticipate Williams assault.

Accordingly, it is ORDERED and ADJUDGED that the judgment on appeal is hereby affirmed.

FOR THE COURT

/s/

Alan I. Herman, Clerk

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

APPEALS FILE 85-1456

TRIAL COURT CA 3328-85

NOTICE OF APPEAL / PETITION FOR WRIT OF CERTIORARI /APPEAL

Notice is hereby given that, Mark Akins, the appellant, hereby is filing a petition for Writ of Certiorari to the Supreme Court to appeal the Judgment of the District Court of Appeals entered March 31, 1987 affirming the judgment of the trial court.

This appeal is taken, inter alia, pursuant to 28 U.S.C. §1254.

Respectfully submitted,

Richard L. Roble

RICHARD L. ROBLE, ESQ
1297 REILLY LANE
CLARKSTON, GA 30021
(404) 296-8031